BADRUL HISHAM HASHIM v. PP

HIGH COURT MALAYA, PULAU PINANG
AHMAD SHAHRIR MOHD SALLEH JC
[CRIMINAL APPEAL NO: PA-42R(A)-02-11-2017]
16 NOVEMBER 2018

CRIMINAL PROCEDURE: *Accused – Right to counsel – Appeal against conviction and sentence – Accused person defended by 'unauthorised person' – Counsel represented accused person without valid practising certificate – Whether accused denied right to qualified advocate – Whether rendered conviction and sentence bad in law – Criminal Procedure Code, s. 255 – Legal Profession Act 1976, s. 37*

LEGAL PROFESSION: *Practice of law – Unauthorised person – Counsel represented accused person without valid practising certificate – Whether counsel entitled to practice – Whether accused denied right to qualified advocate – Whether counsel acted in contravention of s. 37 of Legal Profession Act 1976 – Whether rendered conviction and sentence of accused person bad in law*

The accused was charged for an offence of corruptly receiving gratification under s. 17(a) of the Malaysian Anti Corruption Commission Act 2009 ('MACC Act'). At the end of the trial, the accused was convicted and sentenced to 18 months' imprisonment and a fine of RM10,000, in default, three months imprisonment. The accused appealed against the conviction and sentence. In the appeal, the accused filed an application under s. 317 of the Criminal Procedure Code ('CPC') to include additional evidence, *ie*, a letter of confirmation issued by the Bar Council of Malaysia which stated that Abdul Roni Abd Rahman ('Abdul Roni'), who represented the accused during the trial, was without a valid practising certificate. The application was allowed by the court. It was thus contended that Abdul Roni was an 'unauthorised person' within the meaning of s. 36 of the Legal Profession Act 1976 ('LPA') and expressly prohibited from acting as a defence counsel for the accused. It followed that the trial was void *ab initio* as the accused was denied his right to a qualified advocate in his defence and therefore, the trial ought to be set aside and a new trial to be ordered.

Held (allowing appeal and setting aside conviction and sentence; remitting case to Sessions Court for retrial):

(1) The right to be defended by a counsel chosen by the accused is a constitutional right guaranteed under art. 5(3) of the Federal Constitution ('FC') and it is a two-tiered right. The first applies at the stage after an arrest is made and the second applies when the arrested person is charged. The constitutional guarantee of right to counsel is conjointly reinforced by ss. 28A and 255 of the CPC. Section 28A is applicable after an arrest is made whereas s. 255 applies when the person arrested is charged. The issue in this case involved the right of the

A accused when he was charged for the offence under s. 17(a) of the MACC Act and therefore, s. 255 of the CPC provides for the right of an accused person to be defended by an advocate. (paras 29 & 30)

(2) In construing whether Abdul Roni was an 'advocate' pursuant to s. 255 of the CPC, reference was made to s. 3 of the Interpretation Acts B 1948 and 1967 which provides that an 'advocate' means a person entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia. This interpretation is more apt and promotes the underlying purpose or object of s. 255 of the CPC as distinguished from the interpretation of the term 'advocate and solicitor' C under s. 3 of the LPA. Without a valid practising certificate as regulated under the LPA, Abdul Roni was not entitled to practice in any part of Malaysia notwithstanding the existence of his name in the Roll. The Roll, under s. 28 of the LPA, serves as a register to keep records of persons who have been admitted as advocates and solicitors but these D persons may not necessarily be lawyers with valid practising certificates. (paras 34 & 37)

(3) The court took note that the competency of Abdul Roni was not an issue. However, competency could never be a substitute to legality. Abdul Roni, by not possessing a valid practicing certificate at the E material time when he represented the accused, had denied the accused the right to be defended by an advocate which, in turn, rendered the conviction muddled with infirmities. This court should not, and definitely would not, allow itself to be used as an instrument to tacitly allow an illegal act to be perpetuated before it. The act of Abdul Roni F in representing the accused in his defence at the trial court was definitely an act in contravention of s. 37 of the LPA. In the circumstances, the conviction and sentence was bad in law as the constitutional and statutory right of the accused to be defended by an advocate had been trampled. (paras 33, 38, 39 & 42)

G *Obiter*

(1) Although the incidence may not be a prevalent occurrence within the legal profession, it was nevertheless imperative for the Bar Council of Malaysia to inquire into this matter to ensure that the integrity of the noble profession remained protected and to safeguard litigants from H recurrence of such irresponsible act by 'unauthorised persons'. (para 42)

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 FC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Mohd Ibrahim Salleh & Ors [2000] 2 CLJ 501 HC I ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Voo Kee Chang & Anor [1994] 1 LNS 18 HC ***(refd)***

Ogbodo Sunday Tochukwau v. PP & Other Appeals [2016] 9 CLJ 686 CA ***(refd)***

PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162 HC ***(refd)***
PP lwn. Sahimi Arifin [2015] 1 LNS 373 HC ***(refd)***
PP v. Tan Sri Eric Chia Eng Hock [2005] 6 CLJ 355 HC ***(refd)***
PP lwn. Zul Hassan & Yang Lain [2013] 7 CLJ 141 CA ***(refd)***
Saleh Amer lwn. PP [2016] 1 LNS 1545 CA ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Sparling v. Brereton [1866] LR 2 EQ 64 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 28A, 255, 317
Federal Constitution, art. 5(3)
Industrial Relations Act 1967, s. 23A(1)
Interpretation Acts 1948 and 1967, s. 3
Legal Profession Act 1976, ss. 3, 28, 29, 36(1), 37
Malaysian Anti-Corruption Commission Act 2009, ss. 17(a), 28(1)(c)
Poisons Act 1952, Third Schedule

For the appellant - Ang Chun Pun; M/s CP Ang & Co
For the respondent - Ahmad Ghazali Muhamad Nadzri; DPP

[Editor's note: Appeal from Sessions Court; Arrest Case No: 61R-04-05-2016]

Reported by S Barathi

JUDGMENT

Ahmad Shahrir Mohd Salleh JC:

Introduction

[1] The accused in the present appeal was charged for an offence of corruptly receiving gratification under s. 17(a) of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act 2009). The case was heard together with another related case against one Raja Mohd Shah Heri who was charged with the offence of abetting the accused in the present appeal in corruptly receiving gratification under s. 17(a) read together with s. 28(1)(c) of the MACC Act 2009.

[2] At the close of prosecution, the learned Sessions Court Judge found that the prosecution has succeeded in establishing a *prima facie* case against both the accused in the present appeal and Raja Mohd Shah Heri and ordered them to enter their defence. At the close of defence, the learned Sessions Court Judge found that the defence put forward by the accused in the present appeal and Raja Mohd Shah Heri is a bare denial. Both of them were convicted and sentenced each of them to 18 months of imprisonment and a fine of RM10,000 in default three months of imprisonment.

[3] Both the accused in the present appeal and Raja Mohd Shah Heri appeal against the conviction and sentence. However, Raja Mohd Shah Heri withdrew his appeal midway but the appeal by the accused in the present appeal remains.

[4] The learned counsel filed an application under s. 317 of the Criminal Procedure Code to include additional evidence in the appeal, namely to include a letter of confirmation dated 17 October 2017 issued by the Bar Council of Malaysia which states that Mr Abdul Roni bin Abd Rahman, who represented the accused during trial, was without a valid practising certificate since 1 January 2015. The letter of confirmation dated 17 October 2017 was exhibited as exh. B. I found the letter of confirmation dated 17 October 2017 is necessary for the effective disposal of the appeal. The learned DPP conceded and I allowed it to be included.

[5] At the onset, learned counsel intimated that he would only raise one issue in the appeal pertaining to the counsel who represented the accused during trial, namely that Mr Abdul Roni bin Abd Rahman was without a valid practising certificate since 1 January 2015. It is contended by the learned counsel that in the circumstances, Mr Abdul Roni was not an authorised person within the meaning of the Legal Profession Act 1976 (LPA 1976) and did not have the necessary *locus standi* to appear before the court or to represent the accused. Consequently, the trial should be set aside and a new trial be ordered. Premised on this basis, the learned DPP agreed to focus the appeal solely on the preliminary issue.

[6] The prosecution and the accused are referred to as they were at the Sessions Court.

Brief Facts

[7] The charge proffered against the accused in the present appeal reads as follows:

> Bahawa kamu pada 10.12.2014 jam lebih kurang 12:00 malam di kawasan Taman Pelangi, Juru, dalam Daerah Seberang Perai Tengah, dalam Negeri Pulau Pinang, sebagai seorang ejen Kerajaan Malaysia, iaitu Koperal RF 119385 yang bertugas di IPD Seberang Perai Tengah, secara rasuah telah memperoleh suatu suapan untuk diri kamu iaitu wang tunai sebanyak RM1,500.00 daripada Anuar bin Osman (K/P No. 680722-08-6005) sebagai dorongan untuk tidak melakukan suatu perbuatan berhubung dengan hal ehwal prinsipal kamu iaitu tidak mengambil tindakan ke atas Anuar bin Osman yang dikatakan memiliki air ketum yang merupakan kesalahan di bawah Akta Racun 1952 dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan boleh dihukum di bawah seksyen 24 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009.

[8] On 10 December 2014 at 11pm while the complainant, Anuar bin Osman (PW2) and Muhamad Iles bin Manap @ Yeh (PW3) were at the "Restoran Nasi Kandar Pelita" at Auto City, Juru, PW3 received a telephone call from his friend, Zul. Zul informed PW3 that two men who claimed that they were police officers from IPK Penang were looking for him (PW3) at the shed house at Taman Pelangi. Apparently, PW3 used the shed

house to run his business of selling "ketum" juice and as a haven for his customers to consume the "ketum" juice. Part of the psychoactive compounds of "ketum" is mitragynine which is a psychotropic substance listed under the Third Schedule of the Poisons Act 1952.

[9] Upon learning that the two policemen were looking for him, PW3 felt worried and turned to PW2 for help. PW3 asked PW2 to meet the policemen and for PW2 to pretend to be him. PW2 agreed and later both of them went to the shed house at Taman Pelangi.

[10] At 11.15pm, they both arrived at the shed house and PW2 met with the police officers, namely the accused and Hairie Aik Abdullah (PW8). The accused who was then wearing a snow cap introduced himself to PW2 as a police officer from IPK Penang. The accused told PW2,who posed as PW3, that he came there to warn PW2 that selling "ketum" juice is an offence and that PW2 must make some payment to him if PW2 does not want any action taken against him for that offence. PW2 pleaded with the accused and told the accused that he could not fulfil the demand by the accused because business was bad. The accused then told PW2 that they were not the only officers but there were also other superior officers and if PW2 refused to make the payment, the accused would have to call his superior officers to the shed house. But PW2 was adamant and said that he could not give the accused any money. The accused and PW8 then left.

[11] According to PW8, after they left the shed house, the accused received a call from someone. Later they met up with Raja Shah Heri and one Khairul Anwar Abdul Malik @ Boy. The four of them then went off for a drink at a café near the Petronas filling station at Bukit Minyak. At the café, the accused talked about the sale of the "ketum" juice which were taking place at the shed house. According to the accused, the shed house was under protection from the Bukit Minyak police and monthly collections for payments were made at the shed house. The accused then suggested to go back to the shed house and off they went to make a bust. When the shed house was raided, PW3 and a few others ran helter-skelter leaving PW2, Muhammad Khairul Nafiz (PW5) and Ahmad Shukri Muhamad Nasir (PW6) there. The accused together with PW8, Raja Shah Heri and Khairul Anwar Abdul Malik @ Boy turned the shed house inside out and found packets of the "ketum" juice. PW5 and PW6 were then cuffed and the accused then led PW2 farther away from the shed house.

[12] The accused told PW2 that he had enough evidence to arrest PW2, whom he thought was PW3 as the operator of the shed house selling the "ketum" juice, PW5 and PW6 for selling the "ketum" juice. Upon hearing this, PW2 asked the accused as to whether the matter could be "settled". The accused responded by saying that PW2 would have to pay RM5,000 to "settle" the matter. PW2 pleaded with the accused saying he did not have that much money. The accused then was seen discussing with Raja Shah Heri whom the accused called "Tuan" and shortly after that, the accused insisted

for PW2 to still find the means to pay the RM5,000 and it has to be paid that night itself. PW2 then asked the accused for permission to call his friend to help him out and the accused agreed.

[13] PW2 called up PW3 and told PW3 about the demand made by the accused. PW3 told PW2 that he only had RM1,500. PW2 then informed the accused that he can only cough out RM1,500. The accused agreed to accept the RM1,500 and then allowed PW2 to go and collect the money from his friend, PW3. PW2 then went to collect the money from PW3 and delivered it to the accused. When the money was delivered to the accused, Raja Shah Heri too was present.

[14] After PW2 gave the money to the accused, PW2 saw the accused discussed something with Raja Shah Heri. Shortly then, the accused turned back to PW2 and told PW2 that actually the amount that PW2 was supposed to pay was RM10,000 which means that there was a balance of RM8,500 remaining to be settled. The accused then asked PW2 to pay the remaining RM8,500 in instalments. PW2 said that he will call up the accused for the instalments and gave the accused PW3's handphone number because PW2 was then posing as PW3. Later, PW5 and PW6 were uncuffed and the accused, Raja Shah Heri, PW8 and Khairul Anwar Abdul Malik @ Boy left. No arrest was made.

[15] Some three or four days after the incident, PW3 received a call from someone who identified himself as "Aiman" from IPK Penang who had earlier raided PW3's shed house. In the telephone conversation, "Aiman" had asked for the balance of the money promised in instalments of RM1,000. PW3 gave an excuse that he was in Kelantan and could not make the RM1,000 available. "Aiman" accommodated and told PW3 to call him once the RM1,000 is available. Later, PW3 pondered about the matter and sought for views from his friends. Eventually, PW3 reported the matter to the Malaysian Anti-Corruption Commission (MACC).

[16] On 18 December 2014 at 7.30pm, PW3 together with PW2 had a discussion with officers from the MACC at the "Nasi Kandar Nasmir" restaurant at Taman Pelangi. The team from MACC was headed by MACC Assistant Superintendent Khairul Hizam bin Wahab (PW7). After the discussion, PW7 instructed MACC Assistant Superintendent Darshini d/o Gunaseelan (PW11) to accept the oral complaint made by PW2. A trap was then laid out whereby PW3 was instructed to call the accused to deliver the RM1,000 instalment. PW3 called the accused using the same contact number he had used before but the call was answered by the accused's nephew, Wan Suhermi Putra @ Emi (PW9). In the telephone conversation, PW9 told PW3 that he will ask "Aiman" to return PW3's call. Later, PW3 received a call from "Aiman". PW3 told "Aiman" that the RM1,000 instalment was available and "Aiman" told PW3 that he will send PW9 to take the money.

[17] Based on this development, the MACC team arranged for an operation to be carried out whereby PW2 was instructed to masquerade as PW3 and the operation will take place at the shed house at Taman Pelangi. During the operation, PW9 was arrested when he received from PW2 the RM1,000. When interrogated, PW9 admitted that the money he received from PW2 was meant for his uncle, "Aiman". PW9 cooperated with the MACC and called his uncle, "Aiman" to pick up the money at the Key's Char Kuey Teow restaurant at Bandar Perda, Bukit Mertajam. The MACC operation then moved to the Key's Char Kuey Teow restaurant at Bandar Perda, Bukit Mertajam.

[18] At the Key's Char Kuey Teow restaurant at Bandar Perda, Bukit Mertajam, PW9 and the MACC officers took their positions and waited. Moments later, the accused arrived together with his friend and PW9 signalled to the MACC officers on standby that the accused is his uncle "Aiman". At the Key's Char Kuey Teow restaurant, the accused appeared hesitant to get to PW9 and even ignored a short message (SMS) sent by PW9. Moments later, the accused began to leave the Key's Char Kuey Teow restaurant but he was swiftly apprehended by the MACC officers who were there on standby.

Brief Deliberations

Contention Of The Appellant

[19] The learned counsel contends that Mr Abdul Roni bin Abd Rahman who represented the accused at the trial court was, at the material times, an "unauthorised person" within the meaning of s. 36 of the LPA 1976 pursuant to an enquiry of the status of his legal practice with the Bar Council of Malaysia because he did not possess a valid practising certificate since 1 January 2015.

[20] The learned counsel added that in fact, Mr Abdul Roni bin Abd Rahman still did not have a valid practising certificate on the date when this appeal is heard. Since Mr Abdul Roni bin Abd Rahman was without a valid practising certificate at the material times, he is expressly prohibited, by virtue of ss. 36 and 37 of the LPA 1976, from acting as a defence counsel for the accused. Section 37 of the LPA 1976 even provides such an act as a criminal offence punishable with fine or imprisonment or both for any "unauthorised person" who acts as an advocate and solicitor. The learned counsel contends that Mr Abdul Roni bin Abd Rahman was devoid of any *locus standi* to represent the accused at the trial court at the material time.

[21] The learned counsel contends that, as a lay person, the accused in the present appeal should not be tasked with the duty to inquire whether or not Mr Abdul Roni bin Abd Rahman has the necessary credentials to practice and defend him at the trial. In fact, the accused had no inkling at all about the necessity or his right to inquire whether Mr Abdul Roni bin Abd Rahman has a valid practising certificate when he decided to engage him as counsel.

[22] The learned counsel submits that the trial which was concluded at the Sessions Court was void *ab initio* as the accused was denied his right to a qualified advocate in his defence. It is further submitted that this court ought to declare a mistrial, set aside the conviction and order a retrial of the accused. The case of *PP v. Tan Sri Eric Chia Eng Hock* [2005] 6 CLJ 355 is referred for the proposition that this court is duty-bound and possesses wide and unfettered powers to intervene to prevent the occurrence of some real or substantial injustice and to prevent miscarriage of justice.

[23] The learned counsel however was not challenging the competency of Mr Abdul Roni bin Abd Rahman as a defence counsel because Mr Abdul Roni bin Abd Rahman had the necessary skill and experience. To this end, the learned counsel distinguishes the case of *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93 where the Federal Court in that case decided that incompetence of counsel must be flagrant and that the accused must have been deprived a fair trial before a conviction may be quashed on the basis that the present appeal is not one of competence of counsel. The challenge is simply of the fact that Mr Abdul Roni bin Abd Rahman was an "unauthorised person" and that his actions in continuing to act in defence of the accused knowing that he was not in possession of a valid practising certificate is contemptuous to say the least and that this court should not allow this instance to pass as it could create a dangerous precedent. The learned counsel urges this court to declare a mistrial and set aside the conviction and sentence of the learned Sessions Court Judge and order for a retrial.

Contention Of The Respondent

[24] The learned DPP contends that while ss. 36 and 37 of the LPA 1976 deal with acts of an "unauthorised person", they do not deal with the effect on cases handled by an "unauthorised person". The learned DPP contends that in the absence of any provision in the LPA 1976 as to the effect on cases handled by "unauthorised person" such as Mr Abdul Roni bin Abd Rahman, this court ought to apply the common law principles. The learned DPP refers to the case of *Borneo Housing Mortgage Finance Bhd v. Voo Kee Chang & Anor* [1994] 1 LNS 18; [1994] MLJU 102 and submits that a trial is not rendered invalid only on the basis that the counsel was without a valid practising certificate. The court in *Borneo Housing Mortgage Finance Bhd*'s case referred to an English case of *Sparling v. Brereton* [1866] LR 2 EQ 64 and held the view that proceedings taken on behalf of the plaintiff by a firm of solicitors are not invalid even though at the relevant time the advocates had not renewed their practising certificates because their names still appear on the Roll.

[25] Applying the case of *Borneo Housing Mortgage Finance Bhd*, the learned DPP submits that even though Mr Abdul Roni bin Abdul Rahman did not possess a valid practising certificate at the time when he took the role as defence counsel for the accused, his act did not invalidate the trial as

Mr Abdul Roni bin Abd Rahman's name still appears in the Roll as confirmed by the Bar Council of Malaysia *vide* its letter dated 17 October 2017. The learned DPP also refers to the case of *Bank Bumiputra Malaysia Bhd v. Mohd Ibrahim Salleh & Ors* [2000] 2 CLJ 501 and submits that proceedings between a litigant and the opposite party are not invalidated by reason only of the failure of that litigant's solicitors to obtain a proper practising certificate.

[26] To bolster his arguments, the learned DPP further contends that a perusal of the record of proceedings in the present appeal does not show any indication that the accused was not satisfied with the manner his defence was being conducted by Mr Abdul Roni bin Abd Rahman. The learned DPP submits that there is also no evidence to show that Mr Abdul Roni bin Abd Rahman, in the conduct of the accused's defence, was guilty of any misdirection of the law or facts. As such, the question of prejudice against the accused does not arise at all. The learned DPP added that based on the principles of *Sparling v. Brereton* (*supra*) if this court were to invalidate the trial of the accused at the lower court, it would be injurious to the prosecution and the witnesses who had given evidence and much time and cost would be spent in vain.

[27] Touching on the competency of Mr Abdul Roni bin Abd Rahman in the conduct of the accused's defence at the trial court, the learned DPP submits that even the Federal Court in *Shamim Reza Abdul Samad v. PP* (*supra*) underlines two prerequisites before the courts can set aside the conviction on grounds of incompetency, namely (i) that such incompetence must be flagrant in the circumstances; and (ii) that the accused must have been deprived of a fair trial by reason of that incompetence whereas competency of Mr Abdul Roni bin Abd Rahman in the conduct of the accused's defence at the trial court was not an issue. (See also: *Saleh Amer lwn. PP* [2016] 1 LNS 1545). The learned DPP exemplifies the competency of Mr Abdul Roni bin Abd Rahman by citing the following corruption cases which were handled by him:

(a) *PP lwn. Sahimi Arifin* [2015] 1 LNS 373;

(b) *PP lwn. Zul Hassan & Yang Lain* [2013] 7 CLJ 141; and

(c) *PP v. Ku Yahya Ku Bahari & Anor* [2000] 3 CLJ 162.

[28] The learned DPP submits that in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521, the Federal Court by a majority decided that the phrase "advocate and solicitor" means an advocate and solicitor of the High Court admitted and enrolled under the LPA 1976 and the absence of a practising certificate does not diminish the status of that person as an advocate and solicitor pursuant to s. 3 of the LPA 1976.

A **Analysis And Findings**

[29] The right to be defended by a counsel chosen by the accused is a constitutional right guaranteed under art. 5(3) of the Federal Constitution. The right of counsel under art. 5(3) of the Federal Constitution is a two-tiered right. The first applies at the stage after an arrest is made and the second B applies when the person arrested is charged. Article 5 of the Federal Constitution reads as follows:

> Liberty of the person
>
> 5. (1) No person shall be deprived of his life or personal liberty save in C accordance with law.
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
>
> D (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest **and shall be allowed to consult and be defended by a legal practitioner of his choice**.
>
> (emphasis added)
>
> (4) Where a person is arrested and not released he shall without E unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:
>
> Provided that this Clause shall not apply to the arrest or detention of any F person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:
>
> Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this G Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":
>
> And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.
>
> H (5) Clauses (3) and (4) do not apply to an enemy alien.

[30] This constitutional guarantee of right to counsel is conjointly reinforced by ss. 28A and 255 of the Criminal Procedure Code. Section 28A is applicable after an arrest is made whereas s. 255 applies when the person I arrested is charged. For the purposes of the present appeal, I shall deal with s. 255 of the Criminal Procedure Code as the issue at hand involves the right

of the accused when he is charged for the offence under s. 17(a) of the MACC Act 2009. Section 255 of the Criminal Procedure Code provides for the right of an accused person to be defended by an advocate. It reads as follows:

> Right of accused to be defended
>
> 255. Subject to any express provision of law to the contrary, every person accused before any criminal Court may of right be defended **by an advocate**.
>
> (emphasis added).

[31] The trial commenced on 6 February 2017 when the prosecution called its first witness for examination and the prosecution closed its case on 19 April 2017 after having called a total of 17 witnesses. At the close of prosecution, the learned Sessions Court Judge found that the prosecution has succeeded in establishing a *prima facie* case and called upon the accused to enter his defence. The defence then began its case on 17 August 2017.

[32] At the close of defence, the learned Sessions Court Judge found in favour of the prosecution and convicted the accused. The accused was sentenced to 18 months of imprisonment and a fine of RM10,000 in default three months of imprisonment. Since the commencement of trial, the accused was represented by Mr Abdul Roni bin Abd Rahman. However, according to the learned counsel, Mr Abdul Roni bin Abd Rahman did not possess a valid practising certificate since 1 January 2015.

[33] It is not disputed that during the conduct of the accused's defence, Mr Abdul Roni bin Abd Rahman was not in possession of a valid practising certificate as mandated by s. 36(1) of the LPA 1976. In fact, as disclosed by the learned counsel to this court, Mr Abdul Roni bin Abd Rahman was without a valid practising certificate since 1 January 2015. Section 36(1) of the LPA 1976 further categorises Mr Abdul Roni bin Abd Rahman as an "unauthorised person" and s. 37 of the LPA 1976 provides for various offences in relation to acts done by an "unauthorised person". In considering this issue, I take note of the concession by the learned counsel that the competency of Mr Abdul Roni bin Abd Rahman is not an issue.

[34] In construing whether Mr Abdul Roni bin Abd Rahman is an "advocate" pursuant to s. 255 of the Criminal Procedure Code, it is pertinent to make reference to s. 3 of the Interpretation Acts 1948 and 1967 which provides that an "advocate" means a person entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia. I am of the considered view that this interpretation of the term "advocate" is more apt and promotes the underlying purpose or object of s. 255 of the Criminal Procedure Code as distinguished from the interpretation of the term "advocate and solicitor" under s. 3 of the LPA 1976.

[35] In interpreting the word "advocate and solicitor" appearing in the then s. 23A(1) of the Industrial Relations Act 1967, His Lordship Augustine Paul FCJ (as His Lordship then was) in *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195 FC; [2006] 6 MLJ 97; [2006] 2 MLRA 61; [2006] 5 AMR 585 observed that "a person entitled to practise as an advocate and solicitor under the LPA 1976 is one with a practising certificate."

[36] Speaking for the Court of Appeal in *Ogbodo Sunday Tochukwau v. PP & Other Appeals* [2016] 9 CLJ 686 CA; [2016] MLJU 1759; [2016] MLRAU 342; [2016] AMEJ 1718, His Lordship Ahmad Asnawi JCA observed that:

> The dispensation of justice involved both procedural and substantive law. Justice cannot be dispense when its procedures are ignored. The right to be defended by counsel is both an issue of procedure and substantive law. The said right is embedded in our criminal justice system since time immemorial. Section 255 of the Criminal Procedure Code (CPC) expressly provides that every person accused before any criminal court may as of right be defended by an advocate, subject to any express provision of the law to the contrary.

[37] In the present appeal, I hold the considered view that notwithstanding the competency or otherwise of Mr Abdul Roni bin Abd Rahman, the accused was denied of his right to be defended by an advocate during the trial at the Sessions Court because at the material time, Mr Abdul Roni bin Abd Rahman was not an advocate. Without a valid practising certificate as regulated under the LPA 1976, Mr Abdul Roni bin Abd Rahman was not entitled to practise in any part of Malaysia notwithstanding the existence of his name in the Roll. Under s. 28 of the LPA 1976, the Roll serves as a register to keep records of persons who have been admitted as advocates and solicitors but these persons may not necessarily be lawyers with valid practising certificates.

[38] Since Mr Abdul Roni bin Abd Rahman did not possess a valid practising certificate at the material time when he represented the accused at the trial court, the accused was denied his right to be defended by an advocate and this renders the conviction muddled with infirmities. An accused may choose to conduct a case in his own defence but it is unknown to law for a third party, as distinguished from an advocate with the necessary practising certificate validly issued under the LPA 1976, to act on his behalf in a criminal defence. It is reasonable to comprehend that a person accused of an offence such as the accused in the present case would not normally inquire from his "lawyer" whether he has a valid practising certificate before agreeing to engage him in his defence. I am also unable to accede to the arguments put forth by the learned DPP of the competency of Mr Abdul Roni bin Abd Rahman, either real or perceived. Competency can never be a substitute to legality.

[39] I hold the considered view that this court should not and definitely will not allow itself to be used as an instrument to tacitly allow an illegal act to be perpetuated before it. The act of Mr Abdul Roni bin Abd Rahman in representing the accused in his defence at the trial court is definite any act in contravention of s. 37 of the LPA 1976. It is not a mere contravention of a statutory provision without any penal consequences but one which is prescribed as an offence punishable with imprisonment and fine. I do not think such an act could, in the circumstances, be lightly brushed off with a slap on the wrist. Continuing to represent a client with the knowledge that one is without a valid practising certificate is an affront to the administration of justice and a mockery to the system for which lawyers too, being officers of the court, are part of.

[40] I also hold the considered view that this court would be failing in its duty if on one hand it is tasked, through the Registrar, with the duty to issue practising certificates under s. 29 of the LPA 1976 but on the other hand turn a blind eye on occasions of "unauthorised persons" purporting to act as an advocate before itself. The courts are the last bastion of justice and certainly are not the forum where invalid or illegal acts may be condoned.

Conclusion

[41] In the upshot, I hold the considered view that the conviction and sentence is bad in law as the constitutional and statutory right of the accused to be defended by an advocate has been trampled. In the interest of justice, I hereby allow the appeal and order that the case be remitted back to the Sessions Court for a retrial before another Sessions Judge. The conviction and sentence are hereby set aside.

[42] I hasten to add that although this incidence may not be a prevalent occurrence within the legal profession, it is nevertheless imperative for the Bar Council of Malaysia to inquire into this matter to ensure that the integrity of this noble profession remains protected and to safeguard litigants from the recurrence of such irresponsible acts by "unauthorised persons".